IN THE YOUTH JUSTICE COURT OF NOVA SCOTIA
Citation: *R. v. C.D.*, 2024 NSPC 22

Date: 20240308
Docket: 8673788 - 8673798
Registry: Halifax

Between:

C.D.

Applicant

v.

His Majesty the King

Respondent

DECISION ON APPLICATION FOR STAY OF PROCEEDINGS
***CHARTER*, SS. 7, 8 & 24(1)**

Judge: The Honourable Judge Elizabeth A. Buckle

Heard: January 16, 17, 26, 2024

Decision: March 8, 2024

Charges: 239(1) x 2, *Criminal Code*
430(4), *Criminal Code*
88(1), *Criminal Code*
90(1) x 2, *Criminal Code*
91(2), *Criminal Code*
92(2), *Criminal Code*
268(1) x 2, *Criminal Code*

Counsel: Paul Sheppard, Anna Mancini for the Defence
Jamie VanWart, Terry Nickerson for the Crown

By the Court:

Introduction

[1] C.D. is a 'young person' under the *Youth Criminal Justice Act* (*YCJA*). He has been charged with serious violent offences arising out of the stabbing of a vice-principal and an administrative assistant at a large high school on the morning of March 20, 2023.

[2] The Defence has applied to stay these charges based on alleged breaches of C.D.'s *Charter* rights. He alleges that his rights were breached by two separate state actors in two ways. Both involved significant intrusions on his privacy. First, while in police custody, an officer audio-recorded C.D.'s interactions with health care professionals and captured his private medical information. Second, while in the custody of Nova Scotia Sheriff Services at the courthouse, a Deputy Sheriff photographed C.D. and then published his picture and his name, in violation of the *YCJA*.

[3] A judicial stay of proceedings is a drastic remedy that permanently halts the prosecution and should be granted only in the "clearest of cases".

[4] To determine whether this is one of those cases, I must decide the following:

(1) Did the police conduct in recording C.D.'s private health information violate his right to be free from unreasonable search and seizure, guaranteed by s. 8 of the *Charter*?

(2) Did the Deputy Sheriff's publication of C.D.'s identity violate his right not to be deprived of liberty or security of the person except in accordance with the principles of fundamental justice, guaranteed by s. 7 of the *Charter*?

(3) If the state actors violated either or both of C.D.'s rights, has the test for a stay of proceedings been met?

The Evidence

[5] The evidence of witnesses in the *Charter* hearing included:

- Testimony and affidavits from employees and managers at the Isaac Walton Killam Health Centre (IWK), a women's and children's hospital in Halifax, including Amy Ward (a registered nurse who treated C.D.), Kristin Taylor (a manager), Sarah McIssac (a manager), and Leeann Larocque (former director of the children's health program);

- Testimony from Jennifer Feron (general counsel with the IWK); and

- Testimony from police officers including Cst. Beau Wasson (Halifax Regional Police (HRP), arresting officer), S/Sgt. Chris Marinelli (HRP, watch commander), and Sgt. Jason Stewart (Royal Canadian Mounted Police (RCMP), attempted a formal video-statement from C.D.).

[6] Counsel also filed thirteen exhibits, either on consent or through witnesses:

- A transcript of Cst. Wasson's recording of C.D. ('the recording'), prepared by VideoPlus Transcription and Records Services ('Crown transcript', Ex. 1);

- A transcript of the recording, prepared by Verbatim Inc. ('Defence transcript', Ex. 2);

- A USB containing the recording (Ex. 3);

- A USB of Sgt. Stewart's video-recorded statement of C.D. taken on March 21, 2023 (Ex. 4);

- A Youth Statement Form, completed by Sgt. Stewart on March 21, 2023 (Ex. 5);

- An Agreed Statement of Fact (ASF) relating to photographs taken by the Deputy Sheriff (Ex. 6);

- The affidavit of Maria Baird, legal assistant to the Defence relating to internet searches of C.D.'s name, sworn December 20, 2023 (Ex. 7);

- Photographs taken by the Deputy Sheriff (Ex. 8);

- The affidavits of witnesses: Amy Ward (Ex. 9); Kristin Taylor (Ex. 10); Sarah McIsaac (Ex. 11); and Leeann Laroque (Ex. 12); and,

- An IWK Policy – Interacting with Law Enforcement (Ex. 13).

[7] Most of the facts are not in dispute. The circumstances surrounding the audio-recording and the disclosure of C.D.'s identity are most relevant. However, evidence relating to systemic issues within the police department and Sheriff's Services involving the privacy of health care information, interactions with health care professionals, and obligations under the *YCJA* is potentially relevant to remedy. More specifically, this information may influence my assessment of the seriousness of any *Charter* breaches and the prospective impact, if any, on the integrity of the justice system.

The Recording by Halifax Regional Police

[8] On March 20, 2023, between 9:00 a.m. and 9:30 a.m., a student stabbed the vice-principal and an administrative assistant at a large high school in HRM. Police were dispatched and at approximately 9:30 a.m., Cst. Wasson, Cst. Cadieux and Sgt. MacIsaac arrived on scene.

[9] Cst. Wasson testified that staff directed him to a young man, later identified as C.D., standing outside of the school. C.D. had his arms outstretched "like a cross". He was holding a knife. He had a cut on his neck. He was bleeding and his shirt was stained with blood. He complied with the officers' direction to drop the knife and to fall to his knees. The police handcuffed C.D., told him that he was under arrest, and advised him of his *Charter* rights and the police caution. C.D. said that he understood.

[10] C.D. was emotionally distraught – he was speaking rapidly about different topics. He said that he wanted the police to shoot him. He also made inculpatory statements about the stabbing.

[11] Cst. Wasson placed C.D. in the police car to keep him warm while they waited for an ambulance. Cst. Wasson then re-arrested C.D. for two counts of attempted murder and again advised him of his *Charter* rights and the police caution. Once again, C.D. said that he understood.

[12] At the time, C.D. was a 15-year-old student at the school. Cst. Wasson was aware he was a 'young person' under the *YCJA*. He testified that his *Charter* card has a special segment that pertains to youth. It requires that the rights be provided

"at a level they can understand" and requires the officer to ask the person what they think it means at each stage.

[13] Section 146 of the *YCJA* provides enhanced procedural protections to young people relating to the admission of statements. I will address this section in more detail later, but it includes requirements that the young person be advised that they can consult with a parent.

[14] According to Cst. Wasson, his *Charter* card does not reference s. 146 of the *YCJA* or say anything about alerting a parent or advising the youth about a right to speak with a parent.

[15] Indeed, Cst. Wasson was not aware of s. 146 of the *YCJA*. He was aware that there is a form used when taking a statement from a youth to ensure that they understand their rights and their jeopardy (Ex. 5). He had received training on how to go through the form. He did not have the form with him when he arrested C.D. He testified that he would not consider going through the form in the field because it would require time, space, and the ability to video-record. When asked if he does anything different when arresting youth, he testified that he reads the *Charter* rights and caution more slowly to ensure they understand, and this is what he did with C.D.

[16] At 10:05 a.m., Cst. Wasson turned on his recorder, an audio digital recorder, and advised C.D. that he would be recording their "conversation". Cst. Wasson recalled that, in response, C.D. said "sounds good". However, neither transcript includes that utterance, and I could not hear it on the audio recording. C.D.'s next statement was that he wanted to "say for the record …" and he then made an inculpatory statement (Ex. 1, 2 and 3). This could be interpreted as an acknowledgement that he was being recorded but, he did not say 'sounds good' or otherwise expressly acknowledge that he was being recorded.

[17] Cst. Wasson testified that they were still in the police car when he began recording. Unfortunately, Cst. Wasson did not activate the recording until after he re-arrested C.D. As such, the recording does not provide an independent and objective record of the re-arrest process, including any information about *Charter* rights, the police caution, and C.D.'s responses.

[18] At 10:08 a.m., Cst. Wasson and C.D. entered the ambulance with a paramedic. Cst. Cadieux then advised the paramedics that they were recording. A

female paramedic responded, “sounds good”. C.D. was present when this was said but did not acknowledge the statement.

[19] Police continued to record C.D. while in ambulance and at the hospital while he was receiving medical treatment. In summary, between, 10:05 a.m. and 9:59 p.m., the police recorded C.D. for approximately 8 hours. The police paused the recording for about 40 minutes while he was in surgery. Then, sometime between 2:00 p.m. and 4:40 p.m., police began pausing the recording when medical staff were dealing with C.D. Up to that point, the recording captured all communication in C.D.’s vicinity, including communication between C.D. and medical staff and amongst medical staff about C.D.’s condition and treatment. After that, it continued to capture C.D.’s interactions with others, including his family.

[20] The police did not advise nurses, doctors, a social worker, or C.D.’s family that they were being recorded and they did not advise C.D.’s parents that they were recording him.

[21] S/Sgt. Marinelli was the Watch Commander and the senior officer at the school that morning. He testified that he gave the instruction to audio-record C.D. He said he did that because it had been the practice during his four years in the homicide unit to record suspects from the time they were taken into custody. He assumed C.D. was a youth and he wanted to accurately capture his utterances and to have an accurate depiction of what was going on. His recollection was that he spoke with Cst. Cadieux who had C.D. in custody. S/Sgt. Marinelli testified that he knew the suspect had an injury and needed to go to the hospital. He recalled telling the officer that the recording should be paused if they got into a situation with a doctor. He testified that he said that because of his experience and his understanding of the need to vigorously protect health information.

[22] Cst. Wasson testified that he recorded C.D. because he was instructed to do so by S/Sgt. Chris Marinelli. He said that S/Sgt. Marinelli gave him this instruction in person, shortly before he began recording, and that his partner, Cst. Cadieux was also present. In cross-examination, he maintained that it was S/Sgt. Marinelli who directed him to record C.D. and he denied that he had been directed to pause the recording if a doctor was involved. Unfortunately, Cst. Cadieux did not testify.

[23] I accept Cst. Wasson's testimony that he received the direction to record C.D. from S/Sgt. Marinelli and that S/Sgt. Marinelli did not tell him to pause the recording.

[24] It is possible that S/Sgt. Marinelli gave the direction to pause the recording to someone other than Cst. Wasson. That being said, it does not appear that the recipient was Cst. Cadieux. I say that because Cst. Cadieux was present at the hospital when the recording continued without pause and was part of the subsequent discussions about whether to stop the recording during medical treatment. Cst. Wasson testified that when a nurse raised a concern, his partner (Cst. Cadieux) consulted with their sergeant who told him to pause the recording during medical treatment. The recording captured part of the discussion between the two officers after Cst. Cadiux had spoken with the sergeant (Ex. 1, pp. 64-65):

Cst. Wasson:	do we have to turn it off?
Officer:	yes… like so stop it when there's medical staff
Cst. Wasson:	oh
Officer:	yeah. Just tell them nurse came in to administer medical treatment. Resume, nurse has now left type thing…
	….
Cst. Wasson:	Is that straight from sergeant?
Officer:	yeah, yeah
Cst. Wasson:	Okay
Cst. Wasson:	no one told us that.
Officer:	I know

[25] Based on Cst. Wasson's testimony, I conclude that this conversation is between him and Cst. Cadieux. It is clear from this exchange, that neither were aware of any previous direction to pause the recording during medical treatment. If S/Sgt. Marinelli gave the direction, it was either not to these officers or they did not hear it.

[26] The recording continued during the ambulance ride and captured all discussions between the paramedic and C.D. So as not to further intrude on C.D.'s

privacy, I will not repeat the details of the discussions in this decision. However, the information captured in the ambulance and later at the hospital was private health care information and included information provided by C.D. in response to necessary questions from health care professionals and information exchanged between health care professionals about C.D.'s health history and status.

[27] Cst. Cadieux joined Cst. Wasson and C.D. at the hospital. From that point forward, these two officers were with C.D. and recording everything that transpired until C.D. went into the operating room and the surgeon instructed the officers to leave. There is no evidence that either officer ever told medical staff, C.D.'s family, or the IWK social worker that they were recording. During that time, the recording captured:

- All information provided by EHS to the trauma team (surgeon and nurses) during the handover;
- All discussions amongst medical staff and between staff and C.D. while C.D. was removed from the ambulance, while he was in the emergency bay, and while he was in the operating room until such time as the surgeon instructed police to leave prior to the commencement of the operation;
- Commencing at 11: 57 a.m., the recording resumed when Cst. Wasson and Cst. Cadieux entered the operating room and captured discussions between nurses about C.D.'s medical condition and their efforts to rouse C.D.; and,
- All discussions between nurses in the recovery room while C.D. was unconscious or partially conscious, and interactions between C.D. and medical staff once he regained consciousness.

[28] Ms. Ward, a registered nurse, was monitoring C.D. in the recovery room. She testified that she saw the officers typing on their phones and showing them to each other. She thought that was unusual. Then, when she dropped her voice to give a medical report, she saw Cst. Wasson extend his hand toward her with a device in it. She thought it was his phone and she believed that he was using it to record. I believe she was mistaken that the device was a phone. I accept Cst. Wasson's evidence that all recordings were made on his digital recorder. That

device is a stand-alone, department-issued recorder which lessens the risk that the recorded information could leave the control of the Halifax Regional Police.

[29] Cst. Wasson testified that the recorder was always in an external pocket on his vest, partially visible, and that it had a red light on when recording. That detail is not particularly relevant. However, I think it is more likely that he did, as Ms. Ward described, extend it toward her to capture what was being said. She had not noticed it when it was in his vest pocket, and it makes sense that she became aware of it when he took it out.

[30] I accept Cst. Wasson's evidence that the recorder would have been partially visible while in his pocket and I do not find that he was intentionally trying to hide the fact that he was recording. He believed he had the right to record. However, he did not tell the people that he was recording, and I am satisfied that none of the people at the hospital (the staff and C.D.'s family) were aware that he was doing so. The hospital staff and C.D.'s family had more important things to deal with than examining Cst. Wasson's gear. Further, it is unlikely that an ordinary citizen would notice a black device sticking out of an officer's vest, or identify it as a recorder, given the variety of gear that police carry when in uniform.

[31] Ms. Ward's evidence was that she asked Cst. Wasson if they were recording. The transcript captured the discussion after that. Cst. Wasson said "yeah, we have to" … "we've been doing a recording since we arrested him". A nurse then said "so anything … but I don't know how that works when he's in a …. And like on medication as far as…". Cst. Wasson then explained that C.D. was in police custody, that he needed to document any utterances made by C.D. and to make sure "we're not coercing him… that's what we've always done for this sort of stuff". Another nurse then asked, "what's that" and the first nurse said, "they're recording". Cst. Wasson responded "yeah. We told everyone else the …".

[32] That final statement is not accurate. There is no evidence that Cst. Wasson or any other officer told hospital staff that they were being recorded.

[33] Cst. Wasson and his partner were communicating using their phones while in the recovery room. That fact is not particularly relevant. However, the way he answered questions about it is somewhat troubling.

[34] In cross-examination, Defence Counsel asked Cst. Wasson if he and his partner were communicating with each other by text while in the recovery room

and he said “not that I recall”. Once counsel had completed their examinations, I asked for clarification. More specifically, I inquired whether they were using a ‘notes’ function on their phones to communicate, meaning typing a note on their own phones and then simply letting the other officer see it. He confirmed they were doing that.

[35] I appreciate the officer may have interpreted Defence counsel’s question as relating to whether he and his partner were sending each other text messages. However, his response to Defence counsel suggests a reluctance to admit what they were doing. He said they were communicating in this way so as not to disturb the medical process. I accept that was part of the reason. However, they also knew they were being recorded so it is also reasonable to infer that they did not want their communication to be captured by the recorder and that contributed to their decision to communicate by text rather than verbally. I presume that any relevant communication between them was preserved for disclosure purposes.

[36] Ms. Ward was appropriately concerned that the police were recording medical information. She was an experienced nurse who understood the need for the police presence. She had previously treated patients who were in police custody. However, to her knowledge, the police had never recorded her before. She did not think the police were permitted to record a patient’s medical procedures or capture their medical information. She was also disturbed that she had been recorded without her knowledge or consent.

[37] In cross-examination, the Crown suggested, essentially, that she over-reacted. I disagree. In my view, her reaction was exactly what we should all hope for from medical staff. She questioned police about whether they were permitted to do what they were doing, she advised others who might interact with C.D. that they were being recorded, and she ensured that the issue was brought to the attention of her supervisors.

[38] Contrary to the Crown’s suggestion in cross-examination, there is no evidence that she was anything but calm and professional.

[39] She understood why patient confidentiality and privacy surrounding health care information is so important. In the specific circumstance, she was concerned that she could not provide proper care to her patient and still protect his health care privacy. She knew that anything he said to her, anything she said to him, and any information she exchanged with other health care professionals was being

recorded. The Crown suggested she could have simply stepped outside of the recovery room to give her report to other staff. She explained why that was impossible since she was responsible for monitoring him, including his airway, while he came out of the anaesthetic.

[40] This application only directly relates to C.D.'s privacy. However, it is also important to recognize that everyone in C.D.'s vicinity during that time (including hospital staff and C.D.'s family) were also recorded without their knowledge or consent. For staff, to be recorded in their workplace without their knowledge is a significant intrusion. For C.D.'s family, to be recorded without their knowledge during a crisis is worse. Their 15-year-old son was alleged to have committed serious violent offences, he was apparently experiencing a mental health emergency, he was under arrest, and he had surgery for a knife wound to his neck. When C.D.'s father learned, at 4:30 p.m. that police had been recording, he was clearly surprised and told the police that it was "upsetting" (Ex. 1, 2, & 3).

[41] Eventually, health supervisors and police supervisors reached a compromise whereby the audio-recording would continue but would be paused when health care professionals were in the room. On the record before me, it is not entirely clear what time that happened, but it was sometime between 2:00 p.m. and 4:40 p.m.

[42] I also heard evidence relating to the potential for systemic problems in law enforcement relating to a lack of understanding of the privacy of health care information, the role of health care professionals, and their relationship to law enforcement.

[43] S/Sgt. Marinelli's evidence suggests that he understood the importance of privacy of health care information, including the need to keep that information from law enforcement. However, the evidence suggests that the constables working under him did not understand that.

[44] Cst. Wasson's testimony was unclear as to whether he had previously recorded suspects during medical procedures. He testified that he always recorded suspects in custody except when they were speaking with counsel. This allows for the possibility that he had previously recorded interactions with health care professionals. It appears that neither he nor Cst. Cadieux thought there was any problem in doing so. I appreciate that they were directed to record by their Staff Sergeant. However, neither asked any questions about what to do while medical

staff were providing C.D. with treatment. It also appears that he had not received training that stressed the privacy of health care information. He testified that, with respect to recording a suspect, he had never been told what to do during medical procedures. When asked if he would typically leave the recorder on during medical procedures, he said that "based on his training", he would.

[45] Ms. Fearon, general counsel with the IWK, discussed the importance of patient privacy and confidentiality and its legal and public policy underpinnings. She referenced common law protections, health care professional practice ethics guidelines, the hospital's own policy, the Nova Scotia *Personal Health Information Act*, and the *Freedom of Information Protection of Privacy Act*.

[46] The IWK has its own 'Interacting with Law Enforcement' policy (Ex. 13). It was updated in 2019 and is in the process of being updated again to address the issue of audio-recording by police.

[47] The development of the IWK policy included the involvement of the HRP and the RCMP. An earlier version was completed in 2011 and sent to a senior member of the HRP. Since then, Ms. Fearon has personally provided it to individual investigators and supervisors, the HRP community relations officer who is responsible for the IWK, an officer who was in charge of the HRP standards, a deputy chief of the HRP, other senior members of the HRP, and the HRM legal counsel. She acknowledged that the IWK policy does not apply to police in the sense that they are legally obliged to follow it. However, she explained that it informs the police of the rules that the IWK staff must follow and may assist the police in understanding their actions.

[48] Ms. Fearon testified that when the police don't understand the obligations of hospital staff, there is a risk that officers may make 'requests' that are interpreted by staff as 'directions' because they are coming from a person in authority. When the staff comply with such 'requests', they breach their policies and/or the governing legislation. The broader risk is that the public comes to view health care providers as an extension of the police and no longer trusts them when they need help.

[49] In this case, despite Ms. Fearon's efforts to make the HRP aware of the IWK's policy, Cst. Wasson was not familiar with it.

[50] Unrelated to the making of the recording, there are other examples in this case where Cst. Wasson demonstrated a lack of understanding of the limits of his authority and the role of health care professionals. While present in the trauma room, he tried to give direction to the physicians about how they should deal with C.D.'s clothing. He asked medical staff not to cut C.D.'s clothing off. When medical staff decided they had to remove the clothing, Cst. Wasson objected, telling staff not to cut it off, that the clothing was evidence, and that the police had to keep it. When medical staff said the shirt had to come off, he again objected, and suggested they could take it off without cutting it. The medical staff refused (Ex. 1, Crown Transcript, p. 33 – 34). Ms. Fearon explained that there are strict rules about who is permitted to speak in the trauma room and the importance of following those rules. Cst. Wasson's conduct demonstrates a lack of understanding of the rules and dynamics in the trauma room, his authority versus the authority of the physicians, and the need for the health of the suspect to take priority over the preservation of evidence. Further, once the clothing was removed, police asked for it and staff gave it to him. The IWK policy does not permit staff to release a patient's possessions to police without a warrant. Without a proper evidentiary record, I will refrain from commenting on whether the seizure of C.D.'s clothing without a warrant would also constitute a breach of s. 8 of the *Charter*.

[51] Ultimately, there is no evidence that the actions of police interfered with C.D. receiving proper medical care. However, there is evidence that there was a risk of this occurring, considering how: 1) Cst. Wasson's communications in the trauma room could have interfered with urgent and medically necessary communications; 2) Cst. Wasson's attempted interference with the removal of C.D.'s clothing, if acceded to, could have delayed treatment; 3) A suspect who knows they are being recorded may be reluctant to provide necessary information to medical staff; and, 4) Medical staff who know they are being recorded may communicate with patients or each other in a way that attempts to minimize the intrusion on the patient's privacy but negatively impacts clarity.

[52] Ms. Fearon testified that police interactions with hospitals, including the IWK, is relatively routine and she only becomes involved when there are difficulties. However, she provided examples of situations that occurred within the past ten years where the police, including senior and experienced police officers, demonstrated a remarkable lack of understanding of the hospital's role and some degree of a lack of respect for that role and for her.

[53] After C.D. was released from hospital, Sgt. Stewart attempted to interview him. He declined to provide a statement. That process was video-recorded (Ex.4) and Sgt. Stewart used a form to assist him in complying with s. 146 of the *YCJA* (ex. 5). The process lasted approximately 45 minutes. Sgt. Stewart was familiar with the requirements of s. 146 and attempted to comply with them. He testified that he did not complete the process contemplated by s. 146 because C.D. asked to stop the interview.

[54] He was aware that C.D. had a right to consult with both a parent and a lawyer. C.D.'s parents were present, and he gave C.D. an opportunity to consult with them. He acknowledged that he did not ask C.D. whether he was waiving his right to also consult with a lawyer but explained that was because he stopped the interview at C.D.'s request.

The Breach of s. 110 of the *YCJA* by the Deputy Sheriff

[55] The second aspect of this application relates to the disclosure of C.D.'s identity in violation of s. 110 of the *YCJA* by the Deputy Sheriff on March 21st. Those circumstances are captured entirely in exhibits including the ASF (Ex. 6), the photograph (Ex. 8), and the affidavit and attachments relating to internet searches of C.D.'s name (Ex. 7)

[56] In summary, a Deputy Sheriff at the courthouse was a member of a closed online chat group that included approximately ten members of his family. One of its members was a student at the school where the alleged offence had occurred. On March 20th, the group was speculating about the identity of the suspect. The Deputy Sheriff said the person probably would be brought into the courthouse and he would try to find out. Later that day, the Deputy Sheriff photographed a young person - not C.D. - and sent the photo out to the group. He later advised the group that it was the wrong person.

[57] Then, on March 21st, he photographed the Youth Court docket, showing the names and charges of young persons scheduled to appear in Youth Court. I take judicial notice of the fact that youth court dockets are posted in the public area of the courthouse but without the name of the accused. The Deputy Sheriff would only have had access to the docket including C.D.'s full name, by virtue of his position in the criminal justice system. He sent the photo of the docket to the group chat, saying "he is in court today". Later, he photographed the security monitor in the office of the courthouse cell area. The monitor showed C.D. in a

cell speaking with defence counsel. The Deputy Sheriff sent the photo out to the group saying that C.D. had been speaking with a lawyer and that his parents had arrived at the courthouse. A member of the group asked whether C.D.'s parents looked "normal", and the Deputy Sheriff said "ya".

[58] On March 22nd, one of the photographs taken by the Deputy Sheriff appeared on 'snapchat', a social media application. It was seen by a member of the HRP who captured a copy of it and contacted the Sheriff Services Department.

[59] After an investigation, the police arrested and interviewed the Deputy Sheriff. He had been a Deputy Sheriff for two years and a corrections officer before that. During the interview he admitted to taking and sharing the photographs in his family chat group. He was not aware of how it came to be circulated more broadly on social media. The interviewing officer told him that it had "surfaced on numerous places … numerous social media accounts and whatnot.".

[60] The Deputy Sheriff said he did "not think it was a big deal". He did not know that the *YCJA* prohibited him from identifying young persons and he was not aware of any internal policy about photographing people in custody. He explained that if a member of the public were to ask about someone in cells, he would likely provide that information as he wasn't aware he couldn't identify a youth in custody.

[61] The police charged the Deputy Sheriff with an offence under s. 138(1) of the *YCJA*. The Crown referred his case to the Restorative Justice Program. He successfully completed the program and the Crown withdrew the charge. The Department of Sheriff Services terminated his employment.

[62] I have no evidence that the training provided to Deputy Sheriffs includes information about the special protections in the *YCJA*. I also have no evidence of whether there are any applicable policies or directives on this subject.

[63] I accept that the Deputy Sherrif did not disseminate the information beyond the closed chat group. However, there is evidence that the photograph he took was disseminated further, ending up on various other social media sites.

[64] Further, internet searches reveal that C.D.'s name is linked to the offences alleged here. Sometime between March 21st and December 30, 2023 (the date the

affidavit was sworn) a legal assistant working with Defence Counsel conducted an internet search. She typed C.D.'s first and last name into the Google search engine without quotation marks. The resulting page includes links to: 1) A story involving a sports accomplishment of C.D.; 2) Images of C.D. in connection with that accomplishment; 3) A CBC news article, dated March 21, 2023, titled "Student, 15, charged with attempted murder after 2 staff stabbed at Bedford high school"; and, 4) A story from February, 2023, relating to a separate sports accomplishment (Ex. 7).

Legal Principles

[65] C.D. alleges breaches of ss. 7 and 8 of the *Charter*.

[66] The Defence alleges that the recording Cst. Wasson made of C.D. violated s. 8 and the publication of the photographs by the Deputy Sheriff violated s. 7.

[67] The *Charter* only applies to state actors – those who are part of government or state agents (s. 32, *Charter*; *R. v. Buhay*, 2003 SCC 30, para. 25; and *R. v. Broyles*, [1991] 3 S.C.R. 595).

[68] The Crown does not dispute that Cst. Wasson and the Deputy Sheriff were agents of the state.

[69] There is also no dispute that the Defence bears the burden of proving the *Charter* violations on a balance of probabilities (*R. v. Collins*, [1987], 1 S.C.R. 265, para. 21).

Issue 1: Did the Recording Violate s. 8 of the *Charter?*

[70] Section 8 guarantees that everyone has the right to be secure against unreasonable search or seizure.

[71] Section 8 is not engaged unless there is "state action" (*Buhay*, para. 28).

[72] The state action alleged here is Cst. Wasson's audio recording of C.D. C.D. was under arrest and Cst. Wasson was actively engaged in an investigation. He made the recording to collect and preserve evidence.

[73] The Crown does not dispute that this was a state action in that it went beyond mere passive presence. That position is supported by the case law, and I

agree. Passive observations by a police officer who is merely present in a place, even if there is a reasonable expectation of privacy, have been found to not constitute state action (*R. v. LaChappelle*, 2007 ONCA 655, leave to appeal denied, [2007] S.C.C.A. No. 584). However, writing down a suspect's responses to questions posed by health care professionals as part of an active police investigation has been found to constitute state action (*R. v. Ouellette*, 2023 ABKB 342).

[74] Section 8 applies only to a search or seizure where the subject has a reasonable expectation of privacy (*Hunter v. Southam*, [1984] 2 S.C.R. 145).

[75] Virtually every investigatory technique used by police is in some measure a 'search' in that it involves seeking or examining for the purpose of finding something (*R. v. Evans*, [1996] 1 S.C.R. 8, para. 48). The essence of a seizure is the taking of a thing or information from a person by a public authority without that person's consent" (*R. v. Law*, 2002 SCC 10, , para. 15).

[76] Cst. Wasson's conduct in audio recording C.D. is, therefore, capable of constituting a search and/or seizure.

[77] However, only police conduct that interferes with a reasonable expectation of privacy constitutes a 'search' or 'seizure' within the meaning of s. 8 of the *Charter* (*Law*, para. 15; and *R. v. Tessling*, [2004] 3 S.C.R. 432, para. 18; *R. v. A.M.*, 2008 SCC 19, para. 8). State action that does not intrude upon a reasonable privacy interest is not a search or a seizure (*Law*, para. 15; and, *R. v. MacDonald*, 2014 SCC 3, para. 25).

[78] Therefore, to determine whether Cst. Wasson's conduct meets the constitutional threshold for a search or seizure, I must determine whether C.D. had a reasonable expectation of privacy.

Reasonable Expectation of Privacy

[79] To determine whether C.D. had a reasonable expectation of privacy, I have to look at the "totality of the circumstances" and consider four lines of inquiry: (1) the subject matter of the alleged search; (2) whether C.D. had a direct interest in the subject matter; (3) whether C.D. had a subjective expectation of privacy in the subject matter; and (4) whether this subjective expectation of privacy was

objectively reasonable, having regard to the totality of the circumstances (*R. v. Cole*, 2012 SCC 53, para. 40; and, *R. v. Bykovets*, 2024 SCC 6, para. 31).

(1) Subject matter of the search

[80] The recording engaged C.D.'s informational privacy. Cst. Wasson wanted to capture utterances relating to the offence and the circumstances or context within which any utterances were made. These would be relevant to his investigation and any resulting prosecution. However, Cst. Wasson also captured C.D.'s treatment by EHS, his triage at hospital, his pre- and post-operative care, , and his interactions with an IWK social worker, the members of his family, and a Chaplain.

[81] The subject matter of the search for the purpose of the reasonable expectation of privacy inquiry is not what the officer wanted to capture, but what he did capture. The problematic information, such as the health care information, was not the officer's goal. However he recorded that information intentionally in that he knew he was capturing it, he had the ability to turn off the recorder, and he did not.

[82] That information included highly private health care information relating to C.D.'s mental and physical health and treatment.

(2) C.D.'s Interest in the Subject Matter

[83] C.D. had a direct interest in that information.

(3) Subjective Expectation of Privacy

[84] C.D.'s subjective expectation of privacy can be inferred from the nature of the information. Health care information is clearly encompassed within the phrase "biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state" (*Plant*, p. 293). I agree with the Defence submission that health information is amongst "the most sensitive and intensely personal aspects of ourselves" (Defence Brief, p. 19).

[85] C.D. was aware that police were present. However, in this context, that does not diminish his subjective expectation of privacy in his health care information.

C.D. was in police custody, and he could not object to their presence. He required medical treatment, and it was necessary for him to answer questions posed to him by EHS and other health care professionals. It would not be reasonable for him to tell the health care professionals not to discuss his health care information in the presence of the police.

[86] The police told C.D. that they were recording him, and he did not object. Again, I do not believe that this reduces his subjective expectation of privacy in his health care information. Context is important. C.D. was 15 years old. When the police told him that they were recording he was under arrest, he was suffering from a wound on his neck, he needed medical treatment, and he appeared to be experiencing a mental health crisis. Given the lack of clear response from him to this information, I cannot be sure he understood that he was being recorded. If he did, the fact that he did not tell police to stop the recording in these circumstances is not a waiver of his privacy interest in his health care information.

(4) Objectively Reasonable Expectation of Privacy

[87] Whether a subjective expectation of privacy is objectively reasonable is to be determined "from the independent perspective of the reasonable and informed person who is concerned about the long-term consequences of government action from the protection of privacy" (*R. v. Patrick*, [2009] 1 S.C.R. 579, para. 14).

[88] It requires a balancing of the right to be 'left alone by government' and government's interest in pursuing important goals, including law enforcement (*R. v. Plant*, [1993] 3 S.C.R. 281, para. 16).

[89] The cases have identified three central factors that will be relevant to determine whether an expectation of privacy is reasonable: i) the place of the search; ii) the content, including how close it is to the biographical core of personal information; and iii) control over the subject matter (*R. v. Marakah*, 2017 SCC 59; and, *Cole*, paras. 45-78). Other factors that have been considered include the operational realities of the situation, the context, whether the subject matter was in plain view or abandoned, and the invasiveness of the police conduct (*Cole*, para. 45-78; and *R. v. Simard*, BCSC 1901, para. 45).

i) <u>Place of the Search</u>

[90] Assessing this factor is more complicated in this case because the subject matter is information that emanated from a person rather than a physical item seized from a physical space.

[91] This distinction has been recognized by the Supreme Court of Canada in the digital information context, noting that, "[t]his factor was largely developed in the context of territorial privacy, and digital subject matter "does not fit easily within the strictures set out by the jurisprudence" (*Marakah*, at para. 27; *Bykovets,* para. 49).

[92] This case does not involve digital privacy, however, the Court's comments in *Marakah* and *Bykovets* make it clear that where the context is not 'territorial privacy', this factor will be less significant to the determination of a reasonable expectation of privacy (*Bykovets,* para 49).

[93] C.D. was under arrest and in police custody which often equates to a lesser expectation of privacy. However, the physical places at issue here include an ambulance, an emergency triage area, a pre-operative trauma room, and a post-operative recovery room. These are all places where, in normal circumstances, people expect to have privacy as between them and their health care providers.

[94] In *Oullette,* the appellate court found that despite the presence of police in an ambulance, the accused had an objectively reasonable expectation of privacy in the health information that she shared with paramedics (para. 63).

ii) <u>The Content</u>

[95] The content is, as noted above, part of the biographical core of personal information.

iii) <u>Control Over the Subject Matter</u>

[96] Here, the subject matter is information. In *Bykovets,* the majority noted that in that context, the Applicant's control over the subject matter is not determinative (para. 46). Karakatsanis, J., writing for the majority, adopted statements made in earlier decisions of that Court to find that "[t]he self-determination at the heart of informational privacy means that individuals "may choose to divulge certain information for a limited purpose, or to a limited class of persons, and nonetheless retain a reasonable expectation of privacy" (*Jones*, at para. 39)" (para. 46).

[97] In this case, C.D. did not have control over the places (the ambulance or the hospital). However, as the appellate court found in *Ouellete*, he "did have control over [his] personal health information" (para. 59). He had the right to choose whether, to whom and to what extent he would divulge his health information. As the Supreme Court found in *Bykovets*, he could choose to divulge that information to health care professionals for the purpose of being treated "and nonetheless retain a reasonable expectation of privacy" (para. 46; and, *R. v. Jones*, 2017 SCC 60, para. 39).

Other Factors

[98] In *Oulette*, the appellate court found that the search was not intrusive because the police officer who was present in the ambulance taking notes did not record the entirety of the interactions, did not use an electronic recording device, and did not touch the accused (para. 62). Despite that, the Court still found a reasonable expectation of privacy.

[99] In *Simard*, police audio recorded an accused's disclosure of health information to medical staff. The Court found that there was a reasonable expectation of privacy despite his awareness that the police were present (paras. 53-58).

[100] Unlike in *Oulette*, Cst. Wasson did use electronic recording equipment. He recorded all health care interactions from 10:05 a.m. until sometime between 2:30 p.m. and 4:40 p.m. In total, he recorded all interactions that C.D. had with anyone for approximately 8 hours. In my view, that is intrusive.

[101] The relationship between C.D. and the ambulance attendant, the nurses, and the doctors all fall under the category of 'medical practitioner-patient relationship'. That relationship has been found to attract a reasonable expectation of privacy (see *R. v. SS*, 2023 ONCA 130, para. 33 which discusses the relationship between an ambulance attendant and a patient).

[102] There is also legislation that protects health care information (*Personal Health Information Act*, ss. 11 & 36; and, *Freedom of Information and Protection of Privacy Act*).

Conclusion on Reasonable Expectation of Privacy

[103] In the recent decision of the Supreme Court of Canada in *Bykovets* (para. 71), Karakatsanis, J., writing for the majority, stated:

> Defining a reasonable expectation of privacy is an exercise in balance. Individuals are entitled to insist on their right to be left alone by the state. "At the same time, social and economic life creates competing demands. The community wants privacy but it also insists on protection" (*Tessling*, at para. 17).

[104] In conducting this balancing, I must consider the competing interests as well as the potential risks or impacts of recognizing (or not recognizing) a reasonable expectation of privacy in this context (*Bykovets*, paras. 71-91).

[105] Health care information is intensely private information. There are significant risks associated with state access to that information or even a public perception that the state has access. There is a strong public interest in protecting the privacy of health care information.

[106] There is also a public interest in having the police maintain custody of detained suspects who need health care, to accurately capture utterances of suspects, and to keep an accurate record of their dealings with citizens. Here, the police were present during the communication of health care information. That is already an intrusion on the private relationship between an individual and their health-care provider. In many circumstances that police presence will be legally necessary or necessary to protect the safety of health care professionals or the public at large. However, I have no evidence of any valid state or public interest in capturing C.D.'s health care information. Furthermore, I have no evidence of any law enforcement goal that was served by recording it or any operational reality that required that it be recorded.

[107] The focus in this case has been on the recording of the information and I have not been asked to decide whether the mere presence of the police was problematic. It may be that mere presence does not constitute state 'action' or that the balancing exercise would result in a finding that there is no reasonable expectation of privacy vis a vis the police officer whose presence is required.

[108] In my view, failing to recognize a reasonable expectation of privacy in the recording of health care information in this context carries with it significant risks. Individuals in custody who know that their interactions with health care professionals can be recorded may be reluctant to request medical treatment or to

share all information necessary for appropriate diagnosis and treatment. In an effort to protect their patient's privacy or to comply with their own ethical or policy obligations, health care professionals may be reluctant to be candid with their patient about their health situation. A reluctance to communicate by either the patient or the health care professional creates a risk to the patient that they may not receive necessary treatment.

[109] In contrast, recognizing a reasonable expectation of privacy would not place too onerous a burden on law enforcement. Assuming police have a right to be present while health care information is being discussed and have a general right to record their interactions with detained suspects, there is virtually no negative impact arising from the recognition of a reasonable expectation of privacy in relation to the recording of health care information. Police would simply need to pause the recorder when the suspect is interacting with health care professionals or otherwise discussing health care information. The suspect may say or do something that is inculpatory, exculpatory, or otherwise relevant to the investigation while the recorder is paused. However, the officer would not be prevented from noting that relevant information.

[110] This limit on the state's ability to collect information would not, in my view, interfere with any legitimate law enforcement goal.

[111] On balance, I find that C.D.'s subjective expectation of privacy in his health care information was objectively reasonable.

[112] Therefore, the collection of that information through the action of recording it was a search and/or seizure for purpose of s. 8 of the *Charter.*

Was the Search Unreasonable?

[113] There is no dispute that this was a warrantless search/seizure. As such, it was presumptively unreasonable, and it falls to the Crown to establish on a balance of probabilities that it is reasonable.

[114] A search will be reasonable if it is authorized by law, if the law itself is reasonable, and if the search is carried out in a reasonable manner (*Collins*, para. 23).

[115] The Crown did not concede a violation but agreed that the caselaw supports that the act of recording C.D.'s interactions with health care professionals was an unreasonable search or seizure.

[116] In assessing whether the Crown has met its burden, I accept that:

- Cst. Wasson made the recordings for a legitimate law enforcement purpose - to accurately capture any utterances made by C.D. about the offences and to create an accurate record of interactions between the police and C.D. for purposes of assessing voluntariness;
- The initial situation faced by police was operationally challenging;
- The police had a duty to investigate and to maintain custody of C.D. once he was arrested and had to balance that with their need to facilitate medical treatment for C.D.;
- The police did facilitate medical treatment as soon as practically possible;
- Cst. Wasson advised C.D. and EHS personnel that he was recording and they did not object;
- The police did not question or otherwise attempt to elicit information from C.D.;
- The recording did not interfere with C.D.'s medical treatment; and,
- After the recording issue was addressed by senior police and hospital managers, police stopped recording interactions between C.D. and medical staff.

[117] I also accept that:

- Cst. Wasson did not advise hospital staff or C.D.'s family that he was recording them;
- Cst. Wasson knowingly recorded highly private communications that were not specifically relevant to his investigation, including information provided by C.D. to health care professionals in response to their

> questions or for the purpose of receiving proper health care, information provided by health care professionals to C.D. or to other health care professionals related to C.D.'s health, and interactions between C.D. and his family, a social worker, and a Chaplain;
>
> - Cst. Wasson attempted to direct medical staff in the trauma room; and,
>
> - The police seized C.D.'s clothing from the hospital without a warrant.

[118] Some of these findings are not the specific subject of the application. However, the context and surrounding circumstances are relevant to my overall assessment of whether the search/seizure was carried out in a reasonable manner.

[119] The Applicant also argues that Cst. Wasson failed to comply with s. 146 of the *YCJA* and that this is relevant to my determination of whether the search was unreasonable.

[120] I agree with the Crown that any failure by Cst. Wasson to comply with s. 146 does not amount to a separate or 'stand alone' *Charter* violation. Section 146 is not the equivalent of s. 10 of the *Charter*. First, the *YCJA* is not a constitutional document. Therefore, failing to comply with its requirements does not equate with a *Charter* violation. Second, s. 10 of the *Charter* directly and explicitly obligates police to provide detainees with information. In contrast, s. 146 does not explicitly or directly obligate police to do things upon arrest or detention of a young person. Instead, it creates rules that if not followed, may preclude the admission of a statement from a young person.

[121] Section 146(1) states:

> … no oral or written statement made by a young person who is less than eighteen years old, to a peace officer or to any other person who is, in law, a person in authority, on the arrest or detention of the young person or in circumstances where the peace officer or other person has reasonable grounds for believing that the young person has committed an offence is admissible against the young person unless…

[122] It then lists the requirements for admission, including that: the statement was voluntary, which is a reference to the common law voluntariness rules relating to all statements given to persons in authority; the police caution the young person and explain to them their right to consult with counsel and a parent or other adult in appropriate language; the young person be given the opportunity to consult with

counsel and a parent or other adult; and the young person be permitted to have the person consulted present for any statement (*YCJA*, s. 146(2)).

[123] I recognize that the purpose of this hearing is not to determine whether C.D.'s utterances in the recording are admissible in the trial. I have a relatively complete evidentiary record and relatively comprehensive submissions from the Crown and the Defence. However, there may be further evidence or submissions at trial that may impact my view of admissibility. I also recognize that I am permitted to admit a statement under certain circumstances even where the requirements in s. 146(2) have not been met (s. 146(6)).

[124] At this stage, I am satisfied that the requirements in s. 146 were not met. Of course, that is a preliminary view and does not mean that I would reach the same conclusion with the benefit of further evidence or submissions and after a proper consideration of s. 146(6). I also agree with the Applicant that Cst. Wasson's general lack of knowledge of the provision, and the resulting failure to fulfil its requirements, is relevant to my assessment of the seriousness of the *Charter* violation. I say that for the following reasons.

[125] I accept Cst. Wasson's evidence that he explained the caution and right to counsel to C.D. slowly and that he was satisfied that C.D. understood, which demonstrates partial compliance with s. 146. However, he did not advise C.D. that he had a right to consult with a parent or other adult and did not provide him an opportunity to consult with a parent or other adult.

[126] I appreciate that not all aspects of s. 146 can be complied with at the roadside. Like s. 10 of the *Charter,* s. 146 has 'informational' and 'implementational' components. Here, I have no evidence of any practical or operational reason why an officer arresting a young person could not comply with the 'informational' requirements of s. 146. It would simply require the officer who cautions and advises the young person of their *Charter* rights to add the words "and a parent or other adult" to the standard phrase "you have the right to consult with counsel…".

[127] I understand that, at the roadside, an actual opportunity to consult with a parent, will often be operationally impossible. However, that is not unlike the situation faced by police when arresting adults – the detained person is immediately advised of their right to consult with counsel and then they are given access to counsel when that can be accommodated. Sometimes, upon request, that

can be done at the roadside using a cellphone. C.D. was not advised that he could speak with a parent so he did not know to request that and I have no evidence as to whether an opportunity to consult with a parent could have been accommodated while they waited for the ambulance or at any other point during the next 12 hours.

[128] The requirements in s. 146 (1) and (2) do not apply to "spontaneous" oral statements made by the young person before the person in authority "has had a reasonable opportunity to comply with those requirements (*YCJA*, s. 146(3)). The Crown suggested that at least some of C.D.'s utterances might be caught by s. 146(3). I accept that some of C.D.'s utterances were spontaneous and that others were not elicited by questions from the officer but appear to have been elicited by questions from EHS. However, based on the evidentiary record before me, I have concluded that Cst. Wasson had a "reasonable opportunity to comply" with the informational component of s. 146 immediately when he arrested C.D.. If he had done so, evidence that he did not have a reasonable opportunity to comply with the implementation components might very well mean that any subsequent spontaneous utterances would be covered by the exception in s. 146(3).

[129] So, while the failure to comply with s. 146 of the *YCJA* does not equate to a *Charter* violation, it is relevant to my decision that the search/seizure of information was unreasonable. In the adult context, courts have repeatedly stressed the importance of the informational component of s. 10 of the *Charter*. It is no less important in the youth context. Telling a young person that they have a right to speak with a parent may be crucial to their ability to know and assert other important *Charter* rights, including access to counsel. In the context of this case, a parent might have explained to him the significance of the fact that he was being recorded and explored whether police had the right to record him during the communication of medical information.

[130] In all the circumstances, I conclude that the manner in which this search/seizure was conducted was unreasonable. In reaching that conclusion, I rely primarily on the fact that irrelevant, private health care information was 'seized'. However, I have also been influenced by the surrounding circumstances, including that C.D. was not advised of his right to consult with a parent and not given an opportunity to consult with one. I have also taken into account that the medical staff and C.D.'s parents were not advised that the police were recording. Furthermore, I have also considered Cst. Wasson's actions in attempting to direct

medical staff in the trauma room and his seizure of C.D.'s clothing without a warrant.

Issue 2: Did Publication of C.D.'s Identity Violate s. 7 of the *Charter*?

[131] Section 7 guarantees that "everyone has the right to life, liberty and security of the person and not to be deprived thereof except in accordance with the principles of fundamental justice".

[132] The focus of the Applicant's argument under s. 7 is the disclosure of his identity by the Deputy Sheriff. There is no doubt that this infringed C.D.'s privacy in a significant way that may have lasting consequences.

[133] Privacy rights are an important feature of the special protections afforded to young people in the YCJA. For example:

- The Preamble affirms Canada's commitment to the principles in the *United Nations Convention on the Rights of the Child* (*UNCRC*). Article 40(2)(b) of the *UNCRC* contains specific provisions protecting the identity of young persons in criminal proceedings. That preamble should be read as part of that legislation and provides a useful tool for its interpretation (*Interpretation Act*, R.S.C., 1985, c. I-21, s. 13);

- The Declaration of Principle in s. 3 specifically refers to the need for "enhanced procedural protection to ensure that young persons are treated fairly and that their rights, including their right to privacy, are protected" (s. 3(1)(b)(iii));

- Part VI of the *YCJA* is entirely devoted to protection of the privacy of youth engaged in the criminal justice system; and,

- Section 110 specifically prohibits the publication of the name or other information that could lead to the identification of a youth dealt with under the *YCJA*. Violating s. 110 is a hybrid offence under s. 138 of the *YCJA*.

[134] There is no dispute that when the Deputy Sheriff sent the message identifying C.D., he committed an offence under s. 110 of the *YCJA* and violated

C.D.'s privacy. The question is whether that infringement constitutes a violation of C.D.'s *Charter* rights.

[135] As has been noted by other courts, there is no freestanding right to privacy in the *Charter* (e.g. *Cheskes v. Ontario (Attorney General)*, [2007] 87 O.R. (3d) 581(ONSCJ), para. 79). Courts have, however, found that privacy rights are deserving of *Charter* protection, most often under s. 8.

[136] Here, the Applicant argues that it is also protected by s. 7. The Crown disagrees.

[137] To establish a breach of s. 7, an Applicant must establish three things: 1) there was a deprivation of one of the three enumerated interests (life, liberty or security of the person); 2) the deprivation was caused by state action; and, 3) the deprivation impacted a principle of fundamental justice.

[138] The Applicant submits that the Deputy Sheriff's conduct violated his privacy, that 'privacy' engages both 'liberty' and 'security of the person' and is therefore a protected interest under s. 7, and that the resulting deprivation impacted a principle of fundamental justice.

[139] The Applicant also submits that the Deputy Sheriff's conduct undermines the integrity of the judicial process and thus constitutes an abuse of process in the residual category described by the Supreme Court of Canada in *R. v. O'Connor,* [1995] 4 S.C.R. 411, para. 73.

[140] The Crown does not dispute that the Deputy Sheriff's conduct violated C.D.'s privacy. The Crown acknowledges the importance of privacy in the *YCJA* context and does not minimize the seriousness of the Deputy Sheriff's conduct. The Crown does not dispute that if the privacy breach was a deprivation of an enumerated interest, there was a causal connection or nexus between the Deputy Sheriff's conduct (the state action) and the deprivation.

[141] However, the Crown submits that privacy is not a protected interest under s. 7 and, if it is, any resulting deprivation did not impact a principle of fundamental justice. The Crown further submits that considerations relating to a potential abuse of process are substantially intertwined in the assessment of the relationship between privacy and s. 7. As such, the conduct should be assessed using the s. 7

framework and considerations relating to abuse of process should be addressed at the remedy stage.

Enumerated Interest?

[142] The Applicant argues that the liberty interest protected by s. 7 is broad and includes privacy. The Crown acknowledges that liberty includes protection of an individual's personal autonomy but argues that the Deputy Sheriff's actions did not cause physical restraint to C.D. or "prevent him from making fundamental personal choices" (Crown Brief, para. 61). Therefore, his liberty interest was not engaged.

[143] Liberty under s. 7 is not restricted to mere freedom from physical restraint (e.g. *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, para. 49; and, *R. v. Malmo-Levine*, 2003 SCC 74, para. 85).

[144] The Supreme Court's view on its limits has evolved over time.

[145] In the early days of the *Charter*, those justices who took an expansive view of liberty were generally writing minority judgements.

[146] In *Blencoe*, (2000), the majority accepted that liberty went beyond protection from physical restraint (para. 49) and that a person has "the right to make fundamental personal choices free from state interference" (para. 54). The Court noted the expansive views expressed by some members of the Court in earlier judgements but did not clearly adopt those views (paras. 49-54).

[147] However, in *Malmo-Levine*, (2003), a majority did expressly adopt those more expansive views, saying:

> **85** In *Morgentaler, supra,* Wilson J. suggested that liberty "grants the individual a degree of autonomy in making decisions of fundamental personal importance", "without interference from the state" (p. 166). Liberty accordingly means more than freedom from physical restraint. It includes "the right to an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference": *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, at para. 66; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, at para. 80. This is true only to the extent that such matters "can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence": *Godbout, supra*, at para. 66. See also *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44, at para. 54; *Buhlers*

> *v. British Columbia (Superintendent of Motor Vehicles)* (1999), 170 D.L.R. (4th) 344 (B.C.C.A.), at para. 109; *Horsefield v. Ontario (Registrar of Motor Vehicles)* (1999), 44 O.R. (3d) 73 (C.A.).
>
> (Emphasis added)

[148] These statements do not explicitly include a reference to privacy. However, for the reasons that follow, I am satisfied that the privacy interest at issue in this case, the identity of a youth involved in a proceeding under the *YCJA*, is included in concepts of liberty, and is protected by s. 7 of the *Charter*.

[149] To explain how I have reached that conclusion, it is necessary to briefly refer to some of the Supreme Court of Canada's decisions from the past 40 years that demonstrate the evolution of the Court's view of privacy and liberty. I will also review how these decisions have been applied by lower courts.

[150] In *R. v. Dyment*, [1988] 2 S.C.R. 417, the Supreme Court was not specifically required to comment on privacy in the s. 7 context because the Crown's appeal related only to s. 8. However, LaForest, J. writing for himself and Dickson, C.J, in a separate but concurring judgement, addressed the meaning and importance of privacy:

> **17** The foregoing approach is altogether fitting for a constitutional document enshrined at the time when, Westin tells us, society has come to realize that privacy is at the heart of liberty in a modern state; see Alan F. Westin, Privacy and Freedom (1970), pp. 349-50. Grounded in man's physical and moral autonomy, privacy is essential for the well-being of the individual. For this reason alone, it is worthy of constitutional protection, but it also has profound significance for the public order. The restraints imposed on government to pry into the lives of the citizen go to the essence of a democratic state.

[151] In *R. v. Morgentaler*, [1988] 1 S.C.R. 30, Wilson J., at p. 166, said:

> Thus, an aspect of the respect for human dignity on which the Charter is founded is the right to make fundamental personal decisions without interference from the state. This right is a critical component of the right to liberty. Liberty, as was noted in Singh, is a phrase capable of a broad range of meaning. In my view, this right, properly construed, grants the individual a degree of autonomy in making decisions of fundamental personal importance.

[152] LaForest, J. was in dissent in *Morgentaler*. However, later, in *R. v. Beare*, [1988] 2 S.C.R. 387, he expressed "sympathy" for the view that s. 7 included a right to privacy (para. 58).

[153] In *R. v. Hebert*, [1990] 2 S.C.R. 151, and *R. v. Broyles*, [1991] 3 S.C.R. 595, the Supreme Court concluded that s. 7 protected the right to silence upon detention. In these cases, the court did not specifically refer to privacy. However, some members of the Court have subsequently relied on these decisions to suggest that "[c]ertain privacy interests may also inhere in the s. 7 right to life, liberty and security of the person" (LaForest, J. writing for a four-member dissent in *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, para. 66).

[154] Later, in *R.B. v. Childrens Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, LaForest, J., in a separate but concurring judgement for four-members of the Court, adopted the above-quoted statement of Justice Wilson in *Morgentaler* and her view that "…the liberty interest was rooted in the fundamental concepts of human dignity, personal autonomy, privacy and choice in decisions going to the individual's fundamental being" (para. 80).

[155] In *R. v. O'Connor*, the Supreme Court of Canada grappled with competing constitutional rights in the context of production of private records in the hands of third parties. L'Heureux-Dubé, J., writing for herself and two other members of the Court commented on the animating features of s. 7. She said:

> 113 In the same way that this Court recognized in Re B.C. Motor Vehicle Act, supra, that the "principles of fundamental justice" in s. 7 are informed by fundamental tenets of our common law system and by ss. 8 to 14 of the Charter, I think that the terms "liberty" and "security of the person" must, as essential aspects of a free and democratic society, be animated by the rights and values embodied in the common law, the civil law and the Charter. In my view, it is not without significance that one of those rights, s. 8, has been identified as having as its fundamental purpose "to protect individuals from unjustified state intrusions upon their privacy" (Hunter, supra, at p. 160). The right to be secure from unreasonable search and seizure plays a pivotal role in a document that purports to contain the blueprint of the Canadian vision of what constitutes a free and democratic society. Respect for individual privacy is an essential component of what it means to be "free". As a corollary, the infringement of this right undeniably impinges upon an individual's "liberty" in our free and democratic society.

[156] She went on to recognize, albeit in the context of disclosure of private documents, that "… when the reasonable expectation of privacy therein is thereby displaced, the invasion is not with respect to the particular document or record in

question. Rather, it is an invasion of the dignity and self-worth of the individual, who enjoys the right to privacy as an essential aspect of his or her liberty in a free and democratic society" (para. 119).

[157] In *R. v. Mills*, [1999] 3 S.C.R. 668, the Court again considered privacy and s. 7 in the context of a complainant's right to privacy in counselling records. McLachlin and Iacobucci JJ, writing for a majority of seven, said this about privacy and s. 7:

> 79 This Court has most often characterized the values engaged by privacy in terms of liberty, or the right to be left alone by the state. For example, in R. v. Dyment, [1988] 2 S.C.R. 417, at p. 427, La Forest J. commented that "privacy is at the heart of liberty in a modern state". In R. v. Edwards, [1996] 1 S.C.R. 128, at para. 50, per Cory J., privacy was characterized as including "[t]he right to be free from intrusion or interference".
>
> 80 This interest in being left alone by the state includes the ability to control the dissemination of confidential information. As La Forest J. stated in R. v. Duarte, [1995] 1 S.C.R. 30, at pp. 53-54:
>
> > ... it has long been recognized that this freedom not to be compelled to share our confidences with others is the very hallmark of a free society. Yates J., in Millar v. Taylor (1769), 4 Burr. 2303, 98 E.R. 201, states, at p. 2379 and p. 242:
> >
> > > It is certain every man has a right to keep his own sentiments, if he pleases: he has certainly a right to judge whether he will make them public, or commit them only to the sight of his friends.
>
> These privacy concerns are at their strongest where aspects of one's individual identity are at stake, such as in the context of information "about one's lifestyle, intimate relations or political or religious opinions": Thomson Newspapers, supra, at p. 517, per La Forest J., cited with approval in British Columbia Securities Commission v. Branch, [1995] 2 S.C.R. 3, at para. 62.

[158] Lower courts have also considered whether privacy is included in the liberty interest protected by s. 7 and they have concluded that it is.

[159] In *Cheskes v. Ontario (Attorney General)*, the Court considered a s. 7 challenge to legislation in Ontario that would have retroactively opened confidential adoption records without the consent of the person being identified. The Court concluded that the liberty interest under s. 7 protected privacy in that context.

[160] Finally, in *Toronto Star Newspaper Ltd. v. Ontario,* 2012 ONCJ 27, the media outlet applied for access to pre-sentence reports and a victim impact statement filed as exhibits in proceedings involving three young persons. In refusing access to the pre-sentence report, the Court said the following about privacy in the *YCJA* and s. 7 of the *Charter*:

> **40** The concern to avoid labeling and stigmatization is essential to an understanding of why the protection of privacy is such an important value in the *Act*. However it is not the only explanation. The value of the privacy of young persons under the *Act* has deeper roots than exclusively pragmatic considerations would suggest. We must also look to the Charter, because the protection of privacy of young persons has undoubted constitutional significance.
>
> **41** Privacy is recognized in Canadian constitutional jurisprudence as implicating liberty and security interests. In *Dyment*, the court stated that privacy is worthy of constitutional protection because it is "grounded in man's physical and moral autonomy," is "essential for the well-being of the individual," and is "at the heart of liberty in a modern state" (para. 17). These considerations apply equally if not more strongly in the case of young persons [footnote: Even in a school environment the privacy of young persons is protected by the *Charter*:*R. v. A.M.*, [2008] 1 S.C.R. 569]. Furthermore, the constitutional protection of privacy embraces the privacy of young persons, not only as an aspect of their rights under section 7 and 8 of the Charter, but by virtue of the presumption of their diminished moral culpability, which has been found to be a principle of fundamental justice under the *Charter*.

[161] As I said when addressing s. 8, I agree with the Crown that the *YCJA* is not a constitutional document and breaching one of its provisions does not automatically equate with a *Charter* breach. I also agree that the enhanced protections given to youth under that Act do not create a distinct constitutional standard for youth.

[162] However, the protections in the *YCJA* inform the analysis of whether privacy is part of 'liberty'. I have to decide whether the privacy interest at stake here is within the "sphere of personal autonomy wherein individuals may make inherently private choices" or "fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence" that would be part of the liberty interest protected by s. 7.

[163] The special privacy protections mandated by the *YCJA*, the reasons for those protections, and the expectation of a youth that those protections would be followed are all relevant to that determination.

[164] As Judge Cohen said in *Toronto Star Media*, unlike in the adult criminal justice system, "… subject to certain specified and regulated exceptions, a youth dealt with under the *Act* has his or her privacy maintained from the moment that police involvement commences, through the entire process of trial or resolution, sentencing, and archiving or destruction of records" (para. 34).

[165] The reasons for these barriers are addressed in the *Act*'s 'Preamble and Declaration of Principles'. Protection of privacy of young persons is connected to the goal of rehabilitation which is vital to achieving the ultimate objective of the *YCJA* – the long-term protection of the public (*YCJA*, s. 3; *Toronto Star*, para. 36-37; *R. v. D.B.*, 2008 SCC 25).

[166] In *D.B.*, Abella, J., writing for the majority, spoke in detail about the reasons for protecting the privacy/identity of young persons who are involved in the justice system Some of her pertinent quotes include:

- …Scholars agree that [p]ublication increases a youth's self-perception as an offender, disrupts the family's abilities to provide support, and negatively affects interaction with peers, teachers, and the surrounding community" (Nicholas Bala, *Young Offenders Law* (1997), at p. 215) (para. 84);

- …the impact of "stigmatizing and labelling" the young person…can "damage" the offender's "developing self-image and his sense of self-worth" (para. 86); and

- …lifting a ban on publication makes the young person vulnerable to greater psychological and social stress. Accordingly, it renders the sentence significantly more severe. … (para. 87)

[167] Similar comments were made in *R. v. C. (R.)*, 2005 SCC 61, where the Court said, "in protecting the privacy interests of young persons convicted of criminal offences, Parliament has not seen itself as compromising, much less as sacrificing, the interests of the public… Rather, it serves rehabilitative objectives and thereby contributes to the long-term protection of society..." (para. 42).

[168] In *F.N. (Re)*, 2000 SCC 35, para. 14, the Court noted that:

> Stigmatization or premature labeling of a young offender still in his or her formative years is well understood as a problem in the juvenile justice system. A young person once stigmatized as a lawbreaker may, unless given help in redirection, rendered the stigma a self-fulfilling prophecy. …

[169] All of this persuades me that the subject matter of this inquiry, identity of a youth involved in a proceeding under the *YCJA*, is private. A youth's identity is internationally recognized as deserving of protection and is comprehensively protected by Canadian legislation. Furthermore, there are important and well-documented policy reasons for this protection.

[170] However, when discussing 'liberty', the Supreme Court has focused not only on the subject matter but also on the individual's right to control that subject matter. Here, we are speaking about a young person's identity. I recognize that the choice of whether to publish C.D.'s identity, at this time, is not entirely his to make. The *YCJA* creates a presumption of non-disclosure that applies even to him until he is 18 years old (s. 110(3)).

[171] Before C.D. reaches the age of 18, subject to certain exceptions, it is a judge of the Youth Court who makes decisions about identifying the youth, after seeking input from him (s. 110). After C.D. turns 18, he would normally have the choice to disclose his identity or not.

[172] The actions of the Deputy Sheriff in this case have removed the decision from the Youth Court, removed from C.D. the right to have input into the decision, and taken his future choice away from him.

[173] As such, I conclude that the Deputy Sheriff's decision to identify C.D. publicly prevented him from making a fundamental personal choice. In the youth context, this infringement on his statutorily protected privacy impacted his dignity, personal integrity, and autonomy.

[174] As such, this violation of his right to privacy constitutes a deprivation of his right to constitutional right to liberty under s. 7 of the *Charter*.

Security of the Person

[175] The Applicant also argues that privacy rights are included in 'security of the person'.

[176] 'Security of the person' in s. 7 protects both the physical and psychological integrity of the individual (*Morgentaler*, pp. 56 and 173; and, *Blencoe*, para. 55). However, only state interference that causes "serious" psychological stress will constitute a breach of an individual's security of the person (*Blencoe*, para. 55).

[177] There is no reason, in principle, that security of the person would not include a breach of a privacy right where the breach caused serious psychological stress. Several decisions have recognized this.

[178] Lamer, J., in dissent in *Mills v. The Queen*, [1986] 1 S.C.R. 863, recognized in the context of s. 11(b) that 'security of the person' could include the consequences of "overlong subjection to the vexations and vicissitudes of a pending criminal accusation" which could include "stigmatization of the accused, loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs, uncertainty as to the outcome and sanction. …" (para. 195, emphasis added). Other decisions have also hinted that privacy is protected by security of the person (*Hebert* and *Broyles*; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, para. 66: "[c]ertain privacy interests may also inhere in the s. 7 right to life, liberty and security of the person"; *A.C. v. Manitoba (Director of Child and Family Services)*, para. 100; and, *A.B. v. Bragg Communications Inc*., 2012 SCC 46).

[179] To satisfy the requirement for "serious psychological stress", there must be an objectively profound effect on a person's psychological integrity (*Blencoe,* para. 81). It does not have to amount to nervous shock or psychiatric illness but it must be greater than ordinary stress or anxiety (*NB (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46, para. 59; and, *Blencoe,* paras. 81-82).

[180] The Applicant must also establish that the harms were the result of the state conduct. The standard of causation is unclear. In *Blencoe,* the Court discussed whether the state conduct had been the 'direct cause', 'contributing cause', 'contributed to some degree' or merely 'exacerbated' the Applicant's stress (paras. 58-73). The court ultimately did not clearly decide but seemed to accept for the purpose of its analysis that there was a sufficient nexus where the state conduct contributed to the harm to some degree (para. 73).

[181] So, I must assess the quality of the 'injury' to C.D. and the strength of the connection between the state conduct and that injury.

[182] C.D. did not testify, and I have no direct evidence of any impact on him. Any impact would have to be inferred from the evidence I do have or found in the cases that refer to the potential impacts of the identification of a youth.

[183] The Defence submits that the consequences of the Deputy Sheriff's actions include the reality that C.D.'s name is linked to this alleged offence online.

[184] The Crown argues that because of the public nature of the alleged offences that were committed at a busy school during school hours, C.D.'s name was linked to the offences irrespective of the actions of the Deputy Sheriff. More specifically, the Crown suggests that students probably knew the identity of the suspect and the information probably would have been posted on social media by them. As such, it is not possible to say that the state's actions caused any serious and profound psychological impact.

[185] I have evidence that C.D.'s name is now linked online to stories about the alleged offence. However, I do not have direct evidence of why that is the case. The author of any story about the offence that used his name would be committing an offence, so I assume that the stories don't use his name and that the 'linking' in the search engine is the result of some behind the scenes algorithm that at one point had access to information linking C.D.'s name to the story.

[186] The evidence suggests that the day after the event, the Deputy Sheriff's family member who went to the school did not know the suspect's identity. Indeed, it was uncertainty about the suspect's identity that led to the Deputy Sheriff sharing the photograph and the name.

[187] It is reasonable to infer that some people at the school knew or would have independently discovered the identity of the suspect. It may even be reasonable to infer that they then discussed that on social media and this contributed to C.D.'s name being linked to the stories about the alleged offence. However, I have evidence that the Deputy Sheriff's photo went beyond the closed chatgroup and was found on social media. So, it is also reasonable to infer that the Deputy Sheriff's actions contributed to the consequences.

[188] On this evidence, I have to conclude that the Deputy Sheriff's actions at least contributed to C.D.'s name being connected to stories about the offence. Any harm experienced by C.D. is the result of that, so I conclude that the Deputy Sheriff's conduct contributed to some degree to that harm.

[189] As outlined above, courts across Canada have repeatedly recognized the harms associated with breaches of privacy in general and specifically in the youth context (See *O'Connor, Mills, D.B., Toronto Star* and *J.(G.)*).

[190] These risks of harm are so well recognized that, in my view, they can be inferred.

[191] In *Canadian Broadcasting Corp. v. Ontario,* 2023 ONCJ 32, media outlets sought access to the unredacted youth court records of eight young persons charged with murder. In denying the application, the Court said:

> **73** … there is a risk of inadvertent or accidental dissemination of any or all of this private information.
>
> **74** If this occurs, then the damage will be irreversible and cause irreparable harm, both to the young persons' constitutionally protected privacy rights and their rights to a fair trial.
>
> **75** This risk is not speculative, but real, given the speed at which information travels in this digital age.

[192] In *Bragg*, a case in which a teenage girl had been cyberbullied, the Supreme Court spoke of the heightened vulnerability of children based on their chronological age alone (para. 17):

> Recognition of the *inherent* vulnerability of children has consistent and deep roots in Canadian law. This results in protection for young people's privacy under the *Criminal Code*, R.S.C. 1985, c. C-46 (s. 486), the *Youth Criminal Justice Act*, S.C. 2002, c. 1 (s. 110), and child welfare legislation, not to mention international protections such as the *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, all based on age, not the sensitivity of the particular child. As a result, in an application involving sexualized cyberbullying, there is no need for a particular child to demonstrate that she personally conforms to this legal paradigm. The law attributes the heightened vulnerability based on chronology, not temperament: See *R. v. D.B.*, 2008 SCC 25 (CanLII), [2008] 2 S.C.R. 3, at paras. 41, 61 and 84-87; *R. v. Sharpe*, 2001 SCC 2 (CanLII), [2001] 1 S.C.R. 45, at paras. 170-74.

[193] I accept that C.D. is by virtue of his age alone inherently vulnerable to the risk of harm from breaches of his privacy, including labelling and stigmatization.

[194] As I said, by publishing his image, the charges, and his name the Deputy Sheriff contributed to that harm.

[195] Given the comments from the Supreme Court and other courts about the impact of labelling and stigmatization, I am satisfied that the harm in this case

satisfies the requirement for ‘serious psychological stress’. As a result, I find that publishing C.D.’s identity also deprived him of ‘security of the person’.

Abuse of Process

[196] The Applicant also argues that the Deputy Sheriff’s conduct is an abuse of process under the residual category recognized in *O’Connor*. L'Heureux-Dubé, writing for the majority said:

> 73… This residual category does not relate to conduct affecting the fairness of the trial or impairing other procedural rights enumerated in the Charter, but instead addresses the panoply of diverse and sometimes unforeseeable circumstances in which a prosecution is conducted in such a manner as to connote unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process.

[197] Recently, the Supreme Court confirmed there is no “right against abuse of process” in the *Charter* (*R. v. Brunelle,* 2024 SCC 3, para. 28). However, the Court recognized, at para. 28, that the residual category:

> … engages only the principles of fundamental justice in s.7 which protect accused persons from any state conduct that, while not caught by ss. 8 to 14, is nevertheless unfair or vexatious to such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the justice system (*O'Connor*, at para. 73; *Tobiass*, at para. 89; *Regan*, at para. 50; *Nixon*, at para. 41; *Babos*, at para. 31).

[198] I acknowledge being uncertain of where abuse of process fits within the s. 7 analysis identified above. It appears that it relieves the Applicant of the need to demonstrate that the conduct impacted a protected interest. Rather, if the Applicant establishes that the conduct is “unfair or vexatious”, the Court can consider whether it contravened the principles of fundamental justice even if it does not impact life, liberty or security of the person.

[199] Here the conduct that supports a potential abuse of process is the same conduct that I have already decided did impact C.D.’s liberty and security of the person. So, it is unnecessary that I decide, at this stage whether the conduct was also an abuse of process.

Was the Deprivation in Accordance with the Principles of Fundamental Justice?

[200] Fundamental justice includes substantive and procedural protection. Its principles are found in the basic tenets of our legal system (*Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 503).

[201] To qualify as a principle of fundamental justice, a principle must be: (1) a legal principle; (2) about which there is significant societal consensus that it is fundamental to the way the legal system ought to fairly operate; and (3) sufficiently precise to yield a manageable standard against which to measure deprivations of life, liberty or security of the person (*Malmo-Levine*, para. 113).

[202] The question is whether protection of the privacy/identity of young people who are being dealt with under the *YCJA* meets these requirements.

[203] I conclude that it does.

[204] First, it is a legal principle. As discussed above, the need to protect the identity and privacy of young people is recognized internationally in the *United Nations Convention on the Rights of the Child* and contained in Rule 8 of the *UN Standard Minimum Rules for the Administration of Juvenile Justice*. These concepts are incorporated into the Preamble of the *YCJA* and specifically implemented in Part VI of the *YCJA*. Finally, it is relied on as a foundational principle in the youth justice context and when dealing with youth in other contexts (e.g. *D.B.*; *DBCFS v. L.S.K.*, 2022 ONSC 6176, paras. 24-28; and, *Bragg Communications*).

[205] Second, in my view, there is a consensus that privacy for youth is fundamental to the way the legal system ought to fairly operate. Again, this consensus is reflected in the inclusion of protection of privacy for young people in international conventions, the *YCJA*, and its recognition in the jurisprudence. Cases have recognized that it is fundamental to the way the legal system for youth ought to fairly operate. This has been implicitly recognized in many cases but was specifically noted in *Young Person 2 v. CBC*, 2023 ONCJ 309, where the Court stated at para. 57:

> The protection of a young person's privacy interests under the Act is fundamental to achieving the purposes of the Act, which include, among other purposes that are set out in the Act's Preamble, our society's shared responsibility ‘to address the developmental challenges and the needs of young persons and to guide them into adulthood.

[206] Finally, I have concluded it is sufficiently precise to yield a manageable standard against which to measure deprivations of life, liberty or security of the person. In *D.B.*, the Court dealt with the presumption of reduced moral blameworthiness of young persons and concluded that this principle easily met the third criterion. In doing so, the Court noted that the presumption applied throughout any proceeding against them, and "is a principle that has been administered and applied to proceedings against young people for decades in this country". These comments also apply to the principle that the privacy/identity of young people must be protected.

[207] As a result, I conclude that protection of privacy/identity of young people under the *YCJA* is a principle of fundamental justice.

[208] A state actor deprived C.D. of the benefit of that principle. The Deputy Sheriff's actions were not in furtherance of any valid state objective and, in fact, constituted an offence under ss. 110 and 138 of the *Act.* His actions were a far cry from concordance with the principles of fundamental justice.

[209] In summary, I conclude that the protection of privacy/identity of a youth is a protected interest under s. 7 of the *Charter*, that the actions of the Deputy Sheriff deprived C.D. of that protection, and that the deprivation was not in accordance with the principles of fundamental justice. The Deputy Sheriff's conduct violated C.D.'s rights under s. 7 of the *Charter.*

Issue 3: Should the Charges be Stayed?

[210] The Applicant submits that the seriousness and the cumulative impact of the *Charter* breaches require that the charges be stayed pursuant to s. 24(1) of the *Charter.*

[211] A stay of proceedings is recognized as the most drastic remedy a criminal court can order (*R. v. Regan*, 2002 SCC 12, para. 53).

[212] It permanently halts the prosecution, frustrates the truth-seeking function of the trial, and deprives the public of the opportunity to see justice done on the merits of the case (*Babos*, para. 30).

[213] A Court should only grant a stay in the "clearest of cases" (*O'Connor*, para. 68; and, *R. v. Babos*, 2014 SCC 16, para. 31).

[214] In *Babos*, at para. 32, the Court summarized the general requirements to impose a stay:

- There must be prejudice to the accused's right to a fair trial or the integrity of the justice system that will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome;
- There must be no alternative remedy capable of redressing the prejudice; and
- Where there is still uncertainty over whether a stay is warranted, the Court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against the interest that society has in having a final decision on the merits.

[215] In considering whether a stay is appropriate, lower courts have considered the following factors (e.g. *R. v. Knight*, [2010] OJ No. 3817, para. 26):

- The need to dispel any notion that law enforcement officers are above the law;
- Any potential for a positive prospective effect on law enforcement in their duties, including applying relevant legislation;
- The courts' obligation to preserve the integrity of the justice system by not allowing the process to be used in the face of serious misconduct;
- The need to avoid tacit approval of the misconduct; and
- The absence of an alternative remedy and the importance of providing a remedy that will be a deterrent.

(1) Integrity of the Justice System

[216] In this case, the focus under the first *Babos* requirement is the residual, 'integrity of the justice system', category rather than on the fairness of the trial.

[217] In *Babos*, the Supreme Court summarized the relevant inquiries to determine whether the first requirement is met:

> 35 … whether the state has engaged in conduct that is offensive to societal notions of fair play and decency and whether proceeding with a trial in the face of that conduct would be harmful to the integrity of the justice system. To put it in simpler terms, there are limits on the type of conduct society will tolerate in the prosecution of offences. At times, state conduct will be so troublesome that having a trial -- even a fair one -- will leave the impression that the justice system condones conduct that offends

> society's sense of fair play and decency. This harms the integrity of the justice system. In these kinds of cases, the first stage of the test is met.
>
> 36 … it must appear that the state misconduct is likely to continue in the future or that the carrying forward of the prosecution will offend society's sense of justice. Ordinarily, the latter condition will not be met unless the former is as well -- society will not take umbrage at the carrying forward of a prosecution unless it is likely that some form of misconduct will continue. There may be exceptional cases in which the past misconduct is so egregious that the mere fact of going forward in the light of it will be offensive. But such cases should be relatively very rare. [*Babos,* para. 36, citing, *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, para. 91]

[218] Finally, regardless of which category the conduct falls in, the Court said the ultimate question is:

> 38 … whether proceeding in light of the impugned conduct would do further harm to the integrity of the justice system. … The court must still consider whether proceeding would lend judicial condonation to the impugned conduct.

[219] The specific conduct here, especially when considered cumulatively, is offensive to societal notions of fair play and decency and should not be tolerated.

[220] A police officer recorded highly private health care interactions between a young person and health care professionals. Those recordings also included hours of interactions with a variety of people, capturing professionals in their workplace and individuals in highly vulnerable moments, without telling them they were being recorded. He was directed to do so and believed he was acting for legitimate law enforcement goals. However, there is no evidence that he questioned his supervisor, paused to consider whether what he was recording had any relevance, or questioned whether he should be recording health care information.

[221] A Deputy Sheriff photographed C.D. while he was in custody at the courthouse. He disseminated that photo and identifying information, solely to satisfy the curiosity of friends and family.

[222] I have already touched on the reasons why these violations were serious when I addressed whether there were *Charter* breaches. Those reasons include: health care information is amongst the most highly protected information; identifying young persons who are being dealt with under the *YCJA* undermines the fundamental principles and philosophy of the *YCJA* and the youth criminal

justice system, including the principle of diminished moral culpability, emphasis on rehabilitation, and avoidance of stigma and labelling; and, there is inferred prejudice when young people are identified.

[223] There is also evidence of systemic issues that make it likely that such conduct may continue to occur. It is one thing to have a single state actor who simply does not understand or chooses to ignore their obligations. It is much more serious when you have evidence of organizational lack of attention to statutory or constitutional requirements.

[224] The breaches were committed by different state actors, but both demonstrate an individual lack of understanding and a systemic lack of attention to the rights of young people in the criminal justice system. For example:

- Cst. Wasson had no real awareness of s. 146 of the *YCJA* or its requirements;
- Cst. Wasson's *Charter* card did not refer to a requirement to advise a youth of their right to consult with a parent;
- S/Sgt. Marinelli, who directed the constables to record C.D., did not mention s. 146 or its special protections;
- The Deputy Sheriff was unaware that he was prohibited from publishing the identity of a young person who was being dealt with under the *YCJA*; and,
- The Deputy Sheriff's lack of knowledge suggests a systemic failure in training, or policies and I have no evidence to rebut that.

[225] The s. 8 breach also demonstrates both an individual lack of understanding and a systemic lack of training, attention, or respect for the privacy of health care information and the role of health care professionals who interact with suspects. For example:

- S/Sgt. Marinelli understood that health care information is private, but I don't accept that he conveyed that knowledge to the officers who were dealing with C.D.;

- The officers knowingly recorded private health care information without questioning that conduct;
- Cst. Wasson felt that his training supported the recording of a suspect's interactions with health care professonals;
- The police failed to advise anyone at the hospital that they were being recorded;
- Cst. Wasson attempted to direct staff in the trauma room to prevent them from cutting off C.D.'s clothing while they were administering medical treatment;
- Police were not aware that hospital policy required staff to have a warrant to release the property of their patients and they seized C.D.'s clothing without a warrant; and,
- Police were generally unaware that the IWK had a policy governing its interactions with law enforcement which had been repeatedly shared with HRP.

[226] There is also evidence of a broader systemic problem. I would describe it as a lack of understanding, appreciation, or training within HRP on how to deal with situations when there is an intersection between the police and health care professionals. The examples in this case and those provided from other interactions between HRP and health professionals demonstrate this. Some examples go beyond mere ignorance and suggest a lack of respect by police for the role of health care professionals, their policies and, in some instances, individuals.

[227] The s. 7 breach is particularly troubling. It occurred at this very courthouse. Of all places, people should expect to have their legal rights respected here. It was perpetrated by a peace officer who is charged with the responsibility of ensuring the safety and security of the judiciary, the court staff, the public, and persons in custody. As the Court said in *R. v. B.M.*, 2019 ABPC 190, at para. 72:

> When the agency of the government breaks a law, intended to protect young offenders, the result shakes the foundation of the *Youth Criminal Justice Act*. That breach must be forcefully denounced.

[228] The consequences to C.D. are great. The information will remain on the internet forever. Over time, as he accomplishes positive things in his life, this story will move down on the page of results when his name is searched. However, it is likely that, with effort, prospective employers, friends, romantic partners, coaches, university admissions officers, and scholarship reviewers will be able to find it.

[229] There is also some risk that proceeding with the trial in light of the impugned conduct will do further harm to the integrity of the justice system or lend judicial condonation to the impugned conduct. In some respects, the actions of the Deputy Sheriff have coloured the trial and proceeding with the prosecution is likely to exacerbate the impact of his conduct. C.D. can have a fair trial. However, it cannot be the trial he should have as a young person.

[230] I say that because I assume that whatever algorithm causes C.D.'s name to be associated with stories about the charges will continue to cause future stories, including the evidence at trial, to also be linked to a search of his name. Further, anyone who saw any of the original social media that included his name or photo will know when they read articles about the trial that he is the accused.

[231] However, the Crown will not benefit from and does not seek to benefit from the results of any of these breaches in the trial. I also recognize that the actions of the Deputy Sheriff were not linked to the investigation or evidence gathering and were not intended to advance the prosecution in any way.

[232] A complicating factor here is that the Crown has given notice that they will seek to have C.D. sentenced as an adult. If C.D. were found guilty and sentenced to an adult sentence, the prohibition on publication of his identity would not apply (s. 110(2)(b)). In that event, his identity would be published, and the harm caused to him by the Deputy Sheriff's conduct would be essentially rendered moot. However, the harm to the integrity of the administration of justice would persist.

[233] In all the circumstances, there is an important need here to dispel any notion that law enforcement officers are above the law. This is particularly the case given that the actions, particularly of the Deputy Sheriff, suggest the abuse of power or privilege over people in their custody. There is also a need to avoid any appearance that the court tacitly approves of the conduct and consider a remedy that might have a positive prospective effect on law enforcement.

(2) Alternative Remedies

[234] With respect to the second stage of the test, the Court in *Babos* said:

> 39 … the question is whether any other remedy short of a stay is capable of redressing the prejudice. Different remedies may apply depending on whether the prejudice relates to the accused's right to a fair trial (the main category) or whether it relates to the integrity of the justice system (the residual category). Where the concern is trial fairness, the focus is on restoring an accused's right to a fair trial. Here, procedural remedies, such as ordering a new trial, are more likely to address the prejudice of ongoing unfairness. Where the residual category is invoked, however, and the prejudice complained of is prejudice to the integrity of the justice system, remedies must be directed towards that harm. It must be remembered that for those cases which fall solely within the residual category, the goal is *not* to provide redress to an accused for a wrong that has been done to him or her in the past. Instead, the focus is on whether an alternate remedy short of a stay of proceedings will adequately dissociate the justice system from the impugned state conduct going forward. (emphasis added)

[235] The recording will not form part of the trial. That is not a specific remedy for the s. 8 breach since, in my view, it is unlikely that it would be admissible due to the failure to comply with s. 146.

[236] For the recording, there is no other remedy that could apply to the trial. I can order that the recording and transcripts that are exhibits in this hearing be sealed and, assuming I have jurisdiction to do so, I could also make an order requiring the police to ensure that no one has access to their copies. I recognize that these remedies provide some redress to C.D., but they do not address prejudice to the integrity of the justice system or dissociate it from the impugned conduct going forward.

[237] The potential remedies for the s. 7 breach are more challenging.

[238] The reality is that no remedy will remove the effect of that privacy breach. As the Court said in *O'Connor,* "the essence of privacy, however, is that once invaded, it can seldom be regained…" (para. 119).

[239] It is arguable whether even a stay would help redress the harm to C.D. It would mean that no evidence would be heard that would then be linked to C.D.'s name. However, if he is ultimately acquitted, his name would then be linked to an acquittal, whereas if a stay is imposed, his name is permanently connected to an allegation without any decision on the merits.

[240] There are possible alternative remedies that may help redress the harm to C.D. There may be restrictions that can be placed on publication during the trial that will reduce the impact on him.

[241] Further, sentence reduction is an available remedy for a *Charter* breach, particularly where there is a close connection between the state misconduct and a sentencing principle (*R. v. Nasogaluak*, 2010 SCC 6 para. 50-53). Here, in my view there is a close connection between the conduct that resulted in the s. 7 breach and the applicable sentencing principles. As Abella, J. said in *D.B.*, "lifting a ban on publication … renders the sentence significantly more severe...." (para. 87). In effect, the ban on publication here has already been lifted, albeit illegally, so C.D. has already experienced an impact of receiving an adult sentence without any finding of guilt or judicial determination that an adult sentence was warranted.

[242] A sentence reduction, including at the stage where consideration is being given to a youth or an adult sentence, could be responsive to the s. 7 breach.

[243] These remedies would provide some redress to C.D. and would also signal some degree of condemnation of the conduct and desire to dissociate the justice system from the conduct going forward.

[244] In summary, there are other remedies available that can be directed to the harm and might adequately dissociate the justice system from the conduct going forward. More specifically, these include: putting clear barriers around the recording so that it is either not retained or, if retained, not available to others; consideration of further restrictions on publication during the trial; and, in the event of a finding of guilt, reducing the sentence and/or giving due consideration to the breaches during any assessment of whether to sentence C.D. as an adult.

[245] I recognize that these potential remedies do not fully redress the harm or correct the problems going forward. They certainly do not put the privacy genie back in the bottle. It is possible that the Crown's decision not to use the recording in the prosecution will contribute to education of HRP members, the Deputy Sheriff's conduct will alert his former employer of the need for training and policies relating to the *YCJA*, and the significant consequences to the Deputy Sheriff will have deterrent value on those in that position.

[246] I also accept that imposing the drastic remedy of a stay of proceedings would send the strongest message of condemnation of the conduct and the clearest

statement of the need to dissociate the justice system from the conduct going forward.

(3) Balancing

[247] I am only required to go on to balance the interests in favour of granting a stay against the interest in having a trial on the merits if I am uncertain whether a stay is required after steps one and two. This is a close call, and while I believe there are other remedies that would adequately address the issues, I cannot say I am certain after steps one and two. As such, I will go on to the balancing exercise required by step three.

[248] At this stage, the relevant factors include the following:

- The nature and seriousness of the conduct;
- Whether it was isolated conduct or a systemic, ongoing problem;
- The nature of the charges;
- The circumstances of the accused;
- The interest of the victim; and,
- The broader interest of the community in having charges disposed of on the merits

(*Babos*, para. 41; and, *R. v. Zarinchang*, 2010 ONCA 286, para. 60)

[249] The conduct of both state actors is serious and is made more serious because of the evidence of systemic issues. These primarily relate to the training and policies of the respective organizations. There is some evidence of an attitudinal problem in how law enforcement views the role of health care professionals but there is no evidence that the specific conduct of either of these individuals is anything other than an isolated incident.

[250] I have been involved in the criminal justice system for 30 years, 25 of those years in Nova Scotia. I have never heard of a case where police audio-recorded a suspect while they were being treated by a health care professional. According to S/Sgt. Marinelli, the use of digital recorders by patrol officers is relatively new. This decision may cause HRP to consider further training or policy development around their use, especially in the health care context. There is also a clear need

for further training on issues that may arise when law enforcement and health care intersect, including on the high value placed on privacy of health care information.

[251] Cst. Wasson's purpose in recording C.D. was to collect evidence relevant to the offence. His decision to record was not for the specific purpose of capturing health care information. In that sense, I would describe Cst. Wasson's conduct as negligent rather than malicious.

[252] I have also never heard of a Deputy Sheriff purposefully disclosing information about a prisoner in their custody, whether an adult or a youth. There is no evidence here that Deputy Sheriffs are trained on the special rules that apply to young people under the *YCJA* or that there are policies dealing with those special protections. However, in my experience, the Deputy Sheriffs who work in the courts exercise good common sense, are respectful of the rights of the people in their care, work hard to remain neutral and go out of their way to be of assistance to people in custody, their families, and counsel.

[253] The Deputy Sheriff is a state actor who had contact with C.D. between the time of arrest and prosecution at trial, but he is independent of the police. He was not part of the investigation, the collection of evidence, the decision to prosecute, or the prosecution itself.

[254] His actions were intentional but were personal, motivated by his own desires, and not part of a broader scheme that was connected to the investigation or prosecution.

[255] Both the charges and their surrounding circumstances are serious. The charges include two counts of attempted murder, two counts of aggravated assault, and various offences relating to the possession of knives. The circumstances involve the stabbing of two people at a school while other students were around. This had a significant impact on the victims, the school, and the broader community.

[256] The circumstances of the accused are also relevant. C.D. is a young person. I am not aware of any prior record. He clearly was in the midst of a mental health crisis at the time. The breaches go to the heart of his vulnerabilities, both as a young person and as a person with potential mental health challenges.

[257] I have looked at many of the cases where courts have had to grapple with whether to stay proceeding due to state misconduct. I will review the circumstances in *B.M.* in some detail because the context is similar. In that case, charges against a youth were stayed because his identity was made public in a media release by a government organization called ALERT. B.M. and twelve others had been arrested as part of a child luring investigation. All were identified in a media release that the court described as "intentionally sensational" (para. 41, 61-62). Additionally, in a press conference, a police representative of ALERT gave a press conference referring to "pedophiles being out there" (para. 31).

[258] The Court accepted that the disclosure of B.M.'s identity was a result of carelessness and error. When those responsible realized their error, they quickly attempted to remedy it.

[259] In that case, there was clear evidence of 'serious psychological stress' to B.M. and the Crown conceded that the release of B.M.'s name, age, and city of residence was a breach of his s. 7 right to security of the person.

[260] The Court concluded that the breach was serious and undermined the very integrity of the youth criminal justice system. There was also evidence of a substantial specific impact on the young person: he learned of the media release while at school; he told his mother he wanted to end his life and believed he would be hated by everyone; almost his entire extended family who lived in Newfoundland cut off contact with him; he had trouble in classes, was alienated by friends and schoolmates, and believed he would have difficulty finding employment or being admitted to university (paras. 38-41).

[261] The breach in B.M. was the result of carelessness. However, it was perpetrated by an agency that was closely tied to the investigation. Clearly, investigators fed the information to ALERT and then that agency, which was made up of police, used the information to inform the public.

[262] I have inferred harm to C.D. and I expect that he will have had many of the same worries as B.M. However, I have no evidence of the specific harms that were outlined in B.M.

[263] On balance, the seriousness of the charges, the interests of the victims and the broader community, and the need for a determination on the merits, outweighs the seriousness of the state conduct and its impact on the accused and the justice

system. No remedy, including a stay of proceedings, can remedy the privacy breach caused by the Deputy Sheriff's actions. However, some of the harm that is capable of redress, can be mitigated through alternative remedies.

[264] In conclusion, I am not persuaded that this is the clearest of cases and I decline to impose a stay of proceedings.

Elizabeth Buckle, PCJ